Supreme Court, U.S.
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No. 93-665

In The
Supreme Court of the United States

October Term, 1993

JOHN JABE, Warden,
and
FRANK J. KELLEY, Attorney General,
Petitioners,
v
DAVID A. BUNKER,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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CITATIONS OF OPINIONS AND JUDGMENTS BELOW

The opinions below are set out in the Appendix to Petitioners' Petition.

JURISDICTION

Respondent accepts Petitioners' statement as to the jurisdiction of this Court.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Am XIV:

> Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONCISE STATEMENT OF THE CASE

A.

This appeal arises from a habeas corpus proceeding filed in the United States District Court for the Eastern District of Michigan. 28 USC sec 2254.

Prior to the filing of the petition, the United States Court of Appeals for the Sixth Circuit held in the case of Respondent's trial co-defendant, Robert Casper, that Casper was entitled to habeas relief on the authority of *Sandstrom* v *Montana*, 442 US 510 (1979). *Casper* v *Grant*, #86-1639, 817 F2d 756 (6th Cir 1987), *cert den* 485 US 940 (1988). Casper and Respondent had been tried together, and the instruction found in *Casper* to have violated *Sandstrom* applied to the jury's consideration of the case against Respondent as well.

B.

On December 23, 1966, as the deceased was servicing a car that had pulled into the gas station at which he was working (I-18, 20),[1] the station manager came out to see if he could help. As he approached the car, the manager saw the pump shut off automatically at two dollars' worth of gasoline. He started to go back into the station (I-21, 23-24, 119-120), but when he was eight to ten feet from the car, he heard a loud noise (I-25). Turning, he saw the deceased falling to the pavement on

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[1] **The trial transcript of the underlying case consists of five volumes. Page references are to volume and page numbers of that transcript.**

the driver's side of the car with money fluttering around him (I-26-28). The car immediately sped away (I-30).

Based on a description of the car given by the manager (I-30, III-175-176) and broadcast in the area (I-178), Sterling Township officers quickly spotted the car and stopped it after a high speed chase (II-324, 329-341, 347). The driver was identified as Respondent (II-352), and Casper was the passenger (II-353).

No gun was found in the car, which had been reported stolen from a shopping center in Warren earlier the same day (III-69-70), but a short time later the police recovered an automatic pistol on the shoulder of the road along the chase route (II-360-363). No fingerprints were found on the gun (IV-757). The deceased was killed by a single shot from a pistol with the same caliber (III-139-140).

Respondent and Casper were tried on alternate theories of premeditated and felony murder. The jury returned a general verdict of guilty of first-degree murder as to each. It was the prosecution's theory at trial that the deceased had been killed in the course of attempted robbery (I-10). Respondent denied both an intent to rob and an intent to kill.

Testifying in his own defense, Respondent stated that he had stopped at the Clark station (V-1156) and that when the attendant came back to the car after putting in the gas, he recognized him as someone with whom he had had a fight at a dance some months earlier (V-1156-1159). They exchanged words, and the deceased grabbed hold of him through the car window; he (Respondent) pulled his gun and pushed the deceased away, and as he did so the gun accidentally discharged (V-1160-1161). The deceased was struck by a single bullet which entered from the rear at the right side of the

lower part of the chest and traveled upward, impacting in the front side of the left shoulder (II-139-142).

After leaving the scene, Respondent threw the gun out of the car window (V-1162). While they were driving, Casper repeatedly asked Respondent what he was doing and urged him to return to the station, but he (Respondent) was frightened and refused (V-1161-1162).

In closing arguments, intent was the major issue as to both Respondent and Casper. The prosecutor argued that Respondent had wilfully and deliberately shot the deceased and that Casper had knowingly and intentionally participated in an armed robbery attempt (V-1127 ff). Respondent's attorney agreed that the real issue for the jurors to determine was intent (V-1292), asserting that Respondent had fired accidentally in panic or fright (V-1299, 1308-1309). He also argued that the angling, upward path of the bullet supported the view of a gun that had discharged unintentionally while the deceased was stumbling during a scuffle (V-1302-1304).

In its instructions to the jury, the trial court charged:

> *. . . I instruct you that the law presumes an intent to kill if a person kills another or contributes to the death of another . . . I instruct you as a matter of law, that you may presume an intent to kill if you find the gun, that death came about by a wound inflicted by the shot of a gun . . . it would be rather ridiculous to presume that this particular gun, that the natural consequences of a wound by this particular gun would not be to kill or not to inflict great, serious bodily injury on another human being.*
>
> *. . . even if you do conclude that the act or weapon or manner in which it was used*

> *would naturally tend to cause death or serious bodily injury but if there is evidence to the contrary then you must not in that case presume an intent to kill.* (V-1353-1354; emphasis added)

The case was submitted to the jury on alternative theories of felony murder and common-law murder. Without specifying its finding, on May 25, 1967, the jury returned a general verdict of guilty of first-degree murder as to each defendant.

C.

After an unsuccessful direct appeal in state court, in 1988 Respondent filed a delayed motion for new trial in state court, relying on the Sixth Circuit's holding in *Casper*. Respondent's motion was filed prior to this Court's decision in *Teague* v *Lane*, 489 US 288 (1989). Relief was denied throughout the state court system, after which Respondent filed his petition in the Eastern District of Michigan.

The report and recommendation of the magistrate judge recommended granting the writ, addressing both the applicability of *Sandstrom* to the facts of the case and the particular prejudice to Respondent from the clearly erroneous instruction. The district judge denied the petition but was troubled by the apparent disparity in treatment of Respondent and Casper. Opinion and Order Rejecting the Magistrate Judge's Report and Recommendation and Denying Petition for Writ of Habeas Corpus at p 9.

Relying on *Walter* v *United States*, 969 F2d 814, 817 (9th Cir 1992), and *United States* v *Anderson*, 584 F2d 849, 853 (6th Cir 1978), the Sixth Circuit reversed in an unpublished opinion of June 10, 1993. Rehearing *en banc* was denied on August 23, 1993.

REASONS FOR DENYING THE WRIT

This case presents no issue of significance to this Court's exposition of the Fourteenth Amendment. The facts of the case are so unusual that comparable facts are unlikely to arise except extremely rarely.

This case stands for the simple proposition that similarly situated defendants are to be treated similarly. As stressed by the Sixth Circuit in this case, "the principle that like cases be treated alike is 'particularly strong . . . when the two cases are not merely factually alike or even factually identical, but arise from **the same facts**.'" Slip opinion, citing *Walter*, *supra*.

Although Petitioners would have this Court determine that this is a case calling for application of *Teague*, *supra*, it is factually unique, as Respondent initiated his post-conviction proceedings in state court, relying on the Sixth Circuit's holding in *Casper*, **prior** to this Court's decision in *Teague*.

A fair reading of the Sixth Circuit's opinion in this case makes clear that the Sixth Circuit is appropriately sensitive to the import of this Court's holding in *Teague*, *supra*. *Teague* was construed by the Sixth Circuit in *Cain* v *Redman*, 947 F2d 817 (6th Cir 1991), *cert den* ___ US ___, 112 SCt 1299, 117 LEd2d 521 (1992), to preclude general application of *Sandstrom* to habeas cases, but the unique facts of this case are such as to properly constitute an exception to that rule.

Finally, the carefully prepared report and recommendation of the magistrate judge demonstrates that, even under the standard of *Brecht* v *Abrahamson*, 507 US ___, 113 SCt ___, 123 LEd2d 353 (1993), there has been an adequate showing of impact on the jury's verdict to warrant the granting of habeas relief.

RELIEF REQUESTED

For all the reasons stated above, the Petition should be denied.

Respectfully submitted,

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